78-1845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-2

In the Interest of JOHN M. VITALE, a minor,

(STATE OF ILLINOIS,

Petitioner,

vs.

JOHN M. VITALE,

Respondent.)

BRIEF OF RESPONDENT IN OPPOSITION

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REASONS FOR DENYING THE WRIT

I.

AFTER HAVING BEEN TRIED AND CONVICTED IN A STATE COURT FOR THE OFFENSE OF FAILURE TO REDUCE SPEED TO AVOID AN ACCIDENT, THE DOUBLE JEOPARDY CLAUSE PRECLUDED JOHN VITALE FROM BEING SUBSEQUENTLY AND FURTHER PROSECUTED ON CHARGES OF INVOLUNTARY MANSLAUGHTER.

It is interesting to note that even at this late date the People persist in inserting in their brief and attempting to insert into the record what they want the Court to

believe are the facts in this case. Nowhere in the record is there *anything* to support the People's statements that Vitale "completely disregarded posted school speed limits . . . at an excessive rate of speed and in disregard of the signal of a school crossing guard." These repeated, inflammatory statements suggested by the People to be facts apparently had some influence on Mr. Justice Underwood of the Supreme Court of Illinois who disagreed with the majority holding "which permits a defendant who has caused two deaths to escape punishment other than a nominal fine." Mr. Justice Underwood, in his dissent, accepted the People's version, *i.e.*, a so-called police report never in evidence, as a factual basis for his application of the law. The issue before the Court is not what is proper punishment but rather the application of the Double Jeopardy Clause to this particular case. Perhaps it would be worthwhile to briefly correct the record.

John Vitale entered a plea of *not guilty* to the offense of failure to reduce speed to avoid an accident. He was tried in a state court and found guilty. The officer who issued the traffic citation and subsequently filed the manslaughter charges, testified for the State, as did a school crossing guard. John Vitale testified in his own behalf and was represented by counsel. No court reporter was present and thus no record of the proceedings was made. The following day Vitale was charged with two counts of involuntary manslaughter filed by the same officer who testified against him in court the day before. That is it. That is what is known about this case and nothing more. The Appellate Court of Illinois was satisfied that the State had simply failed to comply with the compulsory joinder statutes, but the Illinois Supreme Court found an additional and even "more compelling reason why respondent cannot be

prosecuted for the offense of involuntary manslaughter" . . . the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States.

1.

SEPARATE STATUTORY OFFENSES NEED NOT BE IDENTICAL TO THE SAME FOR PURPOSES OF DOUBLE JEOPARDY.

In the majority opinion below, the late Mr. Justice Dooley cites the case of *Brown v. Ohio* (1977), 432 U.S. 161, where prosecution and punishment for joyriding prohibited prosecution and punishment for automobile theft. Joyriding was the mere taking of an auto without the owner's permission whereas auto theft required proof of intent to permanently deprive the owner of possession. He then quotes this Court referring to the Double Jeopardy Clause,

> "It has long been understood that separate statutory crimes need not be "identical—either in constituent elements or in actual proof—in order to be the same within the meaning of the constitutional prohibitions."

Mr. Justice Dooley goes on to conclude that the two separate statutory offenses of failure to reduce speed and involuntary manslaughter need not be identical, either in their basic ingredients or in their proof to be the "same" within the Double Jeopardy Clause. In a case which respondent has cited from the very beginning, *Waller v. Florida*, 397 U.S. 387, the holding of the Court was similar to the holding in *Brown*, supra, in that the Court barred successive prosecutions even though the city ordinance and state offenses were separate and distinct in law and different elements of proof were required. The Court held that a defendant who was convicted in a municipal court of ordinance violations for

destruction of city property could not be tried later in a state court on a charge of grand larcency, based on the same acts as were involved in violation of the ordinance.

In the present case, the People have conceded that all offenses arose out of the same, single incident. In fact, it is clear that both the traffic offense and the manslaughter offenses necessarily had to arise from the "same act," that is, the accident. There could have been no offense of failure to reduce speed to avoid an accident without the accident, and there could have been no manslaughter offense without the same accident resulting in death. John Vitale has already been once tried and convicted on this traffic accident and the Double Jeopardy Clause prohibits him from being tried on the same act again.

2.

FOR PURPOSES OF DOUBLE JEOPARDY, CONVICTION OF LESSER INCLUDED OFFENSE PRECLUDES PROSECUTION OF GREATER OFFENSE, AS CONVICTION OF GREATER OFFENSE PRECLUDES PROSECUTION OF LESSER OFFENSE.

Although we have no transcript of John Vitale's trial on the traffic offense, it is reasonable to assume that the testimony taken there would be the same at any subsequent trial of John Vitale, regardless of what charge or charges the State chose to file against him. Would the People press their argument that the traffic charge herein is not a lesser included offense of involuntary manslaughter if the manslaughter trial had taken place first? I doubt very seriously that the People would say they could prosecute John Vitale on the traffic charge, at a later date in a separate court, *after* they had tried him on charges of involuntary manslaughter. This point is well illustrated in *Harris v. Oklahoma*, 53 L.Ed. 1054

(1977), where the defendant was convicted of felony murder in state court, arising from an armed robbery, and subsequently convicted in District Court of the offense of robbery with firearms. The Court held that the Double Jeopardy Clause barred prosecution of the lesser crime after conviction for the greater one. At page 1056, the Court stated that

> ". . . a person who has been tried and convicted for a crime which has various incidents included in it, . . . cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense."

Even though in *Harris* the defendant was tried on the greater charge first, and in the present case Vitale was tried on the lesser charge first, as the Illinois Supreme Court noted in its opinion below, the sequence of the prosecution is immaterial. The offense of failure to reduce speed requires no proof beyond that which is necessary for conviction of the greater offense, involuntary manslaughter. Mr. Justice Dooley stated,

> "Accordingly for purposes of the double jeopardy clause, the greater offense is by definition the "same" as the lesser offense included within it. Failing to reduce speed and involuntary manslaughter cannot be fragmented so as to create different offenses."

If the People's position were carried to its logical conclusion in this case, they would be able to have any number of separate and successive prosecutions as a result of John Vitale's *single act* of failure to reduce speed to avoid an accident. What would stop them from filing charges and demanding separate trials for such offenses as reckless driving, reckless conduct, speeding, too fast for conditions and numerous other similar offenses. Obviously, they would not be permitted to do so and this is amply demonstrated in *Brown v. Ohio*, 432

U.S. 161 (1977) where, in reversing Brown's second conviction, the Court stated at page 196,

> "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."

Vitale's conviction of failure to reduce speed precludes his conviction of involuntary manslaughter, just as conviction of involuntary manslaughter would have precluded his conviction of failure to reduce speed to avoid an accident.

3.

INTERPRETATION OF DOUBLE JEOPARDY CLAUSE IN *VITALE* BASED ON PRECEDENT.

The case which the People refer to, *People v. Zegart*, No. 51229, is totally different than the case at bar. There, Marla Zegart entered a plea of *guilty* and then apparently set it up as a bar to subsequent prosecution for reckless homicide.

John Vitale entered a plea of *not guilty*. There was direct examination and cross examination of both the State's witnesses and Mr. Vitale who was represented by counsel. The case was heard in its entirety and the ultimate facts were determined by a trial judge. The final judgment of guilty was made by a trier of fact, not by a simple plea of guilty to a traffic charge, where no testimony is taken or, as in most cases, where the traffic ticket is paid without a court appearance by the defendant.

If there has been any misinterpretation of *Vitale*, it is most likely due to the fact that the printed decision of the Illinois Supreme Court stated that Vitale had entered a plea of guilty which, of course, was not the case.

CONCLUSION

For these reasons the Petition for a Writ of Certiorari to the Illinois Supreme Court should be denied.

Respectfully submitted,

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